Supreme Court, U.S.
APR 8 - 2010

No. 09-900

In the Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Capital Case

REPLY OF PETITIONER

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INTRODUCTION

The State's brief in opposition should be read exactly for what it is: a transparent attempt to manufacture a procedural bar and rewrite the record so as to divert attention from an unquestionably certiorari-worthy case. The State employs this desperate ruse because this case presents the ideal vehicle for resolving important issues arising from divergent

approaches to assessing prejudice in ineffective assistance of counsel claims.[1]

This case is ideal because no one—including the Fifth Circuit or the State—disputes that trial counsel's performance was deficient with respect to *both* phases of the trial. Thus, questions about the proper prejudice assessment dictate the outcome. Moreover, an honest appraisal of the record plainly demonstrates that this case squarely presents the question this Court believed it was taking in *Bell v. Kelly*, 128 S. Ct. 2108 (2008).

ARGUMENT

I. The State's challenges to the first question presented are illusory.

A. Carty's ineffectiveness claim was not procedurally defaulted.

Although the State devotes eight pages to its argument that "procedural default poses an independent bar to federal court review" of Carty's claims (Resp't's Br. 7), its brief is devoid of an indispensable element: an actual procedural default. The State wholly fails to cite to any part of the record where the state courts invoked an independent and adequate state procedural rule to deny relief. The reason for this is simple; it never happened. Thus, no procedural default exists (or was even asserted). This is

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[1] In support of Carty's petition, the British Government filed an amicus brief detailing the prejudice flowing from the State's and trial counsel's failure to inform the British consulate about Carty's arrest, violating the Bilateral Consular Convention. The State, however, apparently deemed these arguments unworthy of a response.

why the Fifth Circuit reached the merits of Carty's claims—and why this Court is free to review the Fifth Circuit's opinion adjudicating Carty's claims.

There has been just one procedural question about the claims advanced in Carty's Additional Further Response: whether she properly exhausted them in state court. As the State repeatedly has conceded—until its latest filing—whether Carty exhausted these "additional" claims in state court also would be determinative of procedural default:

- In its initial district court answer, the State conceded that Carty exhausted all but one claim and asserted no other grounds for procedural default. (USCA5 1039.)

- After the district court *sua sponte* raised exhaustion (USCA5 1744-49), the State still advanced no argument independent of exhaustion for finding procedural default (USCA5 1916-21).

- In its principal brief to the Fifth Circuit, the State argued that "[t]he Court should also find the unexhausted claims procedurally defaulted as argued in the Director's Opposition to COA" without mentioning any other basis for finding procedural default. (Appellee's Br. 39 n.13.)

- Correspondingly, in its opposition to COA, the State argued that procedural default barred Carty's claims "for the same

> reasons" asserted in its main brief, i.e., that Carty's claims were unexhausted. (Appellee's Opp. to Req. for COA 23-24.)[2]

The Fifth Circuit succinctly described everyone's shared understanding (up until now) of this issue:

> Carty's success on the exhaustion issue would by definition remove the procedural bar to federal review.... While exhaustion and procedural default are two distinct concepts, in cases where procedural default is based on the failure to exhaust, waiver of exhaustion waives both.

(Pet. 66a-67a.) Carty succeeded on the exhaustion issue (and thereby the procedural default issue) by proving that the State waived exhaustion (Pet. 23a-25a); and the State does not challenge the Fifth Circuit's holding in this Court.

Now, for the first time, the State attempts to mislead this Court with a baseless, unsupported assertion that the state courts invoked an independent and adequate ground for denying relief. The State asserts that the "Texas courts rejected the ineffective-assistance claim raised in the first question as untimely under state law." (Resp't's Br. 3; *see also id.* at 4 ("The state habeas court rejected the federal claims urged in petitioner's first question presented because they were raised too late.").) This is a fabrication. At no point did any state court rule that Carty's claims were untimely,

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[2] Thus, the State waived this argument by not advancing it below. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).

and repeatedly asserting to the contrary does not make it true.[3]

As this Court repeatedly has instructed, federal habeas review is precluded only where the state court "clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (internal quotations and citation omitted); *see also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007).

Under Texas law, "[i]f an amended or supplemental application is not filed within the time specified . . ., the court *shall* treat the application as a subsequent application under this section." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(f) (Vernon Supp. 2009) (emphasis added). If the state habeas court had considered Carty's Additional Further Response untimely, it would have performed the procedural tasks required by Section 5, including forwarding the document to the Texas Court of Criminal Appeals ("TCCA") and assigning it an ancillary file number. *Id.* § 5(b) & (f). The state habeas court did not do so. Instead, it forwarded the entirety of Carty's state

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[3] The State artfully attempts to massage a procedural default ruling out of the Fifth Circuit's opinion by noting the court's holding that there was insufficient evidence of an agreement between the parties in state court about Carty's amending her application. (Resp't's Br. 7.) But this was an alternative argument to why Carty fairly presented and thus properly exhausted her claims. If the Fifth Circuit had found for Carty on this point, then it would not have needed to reach waiver (again, not contested by the State here). The State's misleading suggestion that the Fifth Circuit found a procedural bar distorts the record, and the opinion below speaks for itself on this point.

habeas application to the TCCA, which treated no portion of her filings as an abuse of the writ.[4] Indeed, the State's own authorities demonstrate the TCCA's practice of expressly dismissing untimely claims as an abuse of the writ. (Resp't's Br. 5.)

Because the TCCA's denial of relief omitted any reference to its being based on an independent and adequate state law ground, the Fifth Circuit did not err, as the State suggests in its footnote 1, in applying *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999), and reaching the merits of Carty's claim.[5]

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[4] Further, the State never requested that Carty's Additional Further Response be prohibited as a subsequent application. The recommended procedure when the State receives an untimely writ is to prepare a motion/order that states the submitted filing is subsequent and should be sent to the TCCA. (USCA5 2679-80.) The State's handbook even emphasizes use of the phrases "procedurally barred" and "procedurally defaulted" "because the federal courts are bound by [state] procedural bars." (USCA5 2677-78.)

[5] The State's contention that Carty "recognized" that procedural default would bar federal review independent of exhaustion is simply wrong. (Resp't's Br. 8.) On appeal, Carty reiterated what the State and district court had confirmed—if Carty's claims were exhausted, there would be no procedural bar. (Appellant's Br. 12 ("The district court erred by concluding that Carty's claims were unexhausted. Therefore, procedural default does not bar federal review.").) That Carty argued in the alternative in her Motion for Additional COA Issues cannot excuse the State's waiver. (Appellant's Mot. for Add'l COA Issues 21 (arguing that even if Carty's claims were unexhausted, it is debatable as to whether they were procedurally defaulted).)

B. The first question is squarely presented by this case.

Despite acknowledging that "the rule [applied by the Fifth Circuit] does bear a conceptual relationship to a developed disagreement about AEDPA deference" (Resp't's Br. 13), the State nevertheless asserts that the first question "is not fairly presented by the facts" of Carty's case (*id.* at 10). But the State incorrectly conflates the *Bell* conundrum with the defective facts of *Bell* itself. The *Bell* conundrum is whether AEDPA deference should apply when new, non-defaulted *Strickland* evidence properly is considered for the first time in federal habeas proceedings. This Court could not reach that question in *Bell*; no new evidence was considered. Now, under the facts of Carty's case, it can.

The State further attempts to obfuscate the issue by claiming that the "dichotomy between adjudicated and unadjudicated claims of ineffective assistance has been adopted by every circuit to consider the question." (*Id.*) However, of the ten cases cited by the State to support this proposition, only six involved an ineffectiveness claim. And of those six, only *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003), applied the piecemeal deference challenged by Carty. Citing the remaining cases is not only inapposite, but also demonstrates a fundamental misunderstanding of the first question presented. Carty did not present any new *claims* of ineffective assistance in federal court; she presented new, non-defaulted *evidence* of her claim in federal court. Because the state court failed to consider this evidence, and did not expressly hold it procedurally barred, it never adjudicated Carty's ineffective assistance claim "on the merits." "To dispose of a claim without considering the facts supporting it is not a

decision on the merits." *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc).

The State's attempt to downplay the relevance of *Workman* is similarly misguided. Admittedly, the Tenth's Circuit's observation that "the [Fifth Circuit's] *Valdez* decision is not necessarily in conflict with our holding today," *id.* at 1295, was reasonable when decided. But the decision below has removed any doubt. The Fifth Circuit now has cemented a circuit split concerning the very issue this Court was worried about in *Bell*—whether AEDPA's deference requirement applies when new, non-defaulted *Strickland* evidence is considered for the first time in federal court.

C. The Fifth Circuit's piecemeal application of AEDPA deference is fundamentally irreconcilable with *Strickland*, directly passing upon the first question.

The State's final argument against review, that Carty never asked the Fifth Circuit to apply de novo review to the entirety of her ineffectiveness claim (Resp't's Br. 13), barely warrants mention. To be sure, Carty briefed her ineffectiveness claim below under *Riley*, the controlling Fifth Circuit law (which, like the decision below, is fundamentally flawed). At that time, this Court had already dismissed *Bell* as improvidently granted and so chose not to resolve the question. But Carty was not required to ask the Fifth Circuit to overrule governing precedent to advance her claim here. *United States v. Williams*, 504 U.S. 36, 44 (1992) (finding "that a party demand overruling of a squarely applicable, recent circuit precedent" to be "unreasonable"); *see also Harris Trust & Sav. Bank v.*

Salomon Smith Barney Inc., 530 U.S. 238, 245 n.2 (2000) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534, (1992)).

II. This case presents an ideal vehicle to hold that courts must cumulate all instances of deficient performance before applying a single sentencing prejudice assessment.

First, with regard to part A of Carty's second question presented, the State's assertion that Carty did not adequately press her "spillover effects" claim (Resp't's Br. 14-17) falls flat. From the beginning of Carty's quest for federal habeas relief, she advocated for cumulating counsel's errors and reweighing the totality of the case in aggravation versus mitigation. (USCA5 35 ("Cumulatively, these errors mandate that her . . . sentence be vacated."), 53 ("[T]he question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable.") (citing *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999)), 76-77, 128-29.) Carty again pressed this argument in the Fifth Circuit. (Appellant's Br. 47, 59-62; Reply Br. 15 (explaining that due to counsel's errors, "the jury was left to weigh the scant outline of a woman who was described as someone who does not start fires and is not cruel to animals against the prosecution's evidence of a lying, reckless woman involved in the drug underworld and who fabricated multiple pregnancies.").) The only evidence of Carty's *repeatedly* lying about her pregnancies was Corona's testimony. This evidence clearly aggravated the jury's

view of Carty during punishment and *only* reached the jury due to counsel's culpability-phase error.

With regard to part B of Carty's second question and her third question, the State would have this Court believe that while "[p]erhaps more could have been said . . . concerning the effect of counsel's errors" (Resp't's Br. 19), the Fifth Circuit properly cumulated all categories of mitigating evidence. But there is no mistaking the erroneous test that the court applied: it segregated instances of deficient performance and applied a separate prejudice inquiry to each, rather than cumulating all instances and applying a singular prejudice inquiry. Specifically, the court split Carty's singular mitigation claim (Appellant's Br. 46-63), into four subclaims: (1) failure to put on more testimony from her family who testified and testimony from other family members (reviewed under AEDPA and denied); (2) failure to call Corona and Mathis (reviewed de novo, found to be deficient performance, but denied for lack of prejudice); (3) failure to present the St. Kitts witnesses (reviewed de novo, found to be deficient performance, but denied for lack of prejudice); and (4) failure to present evidence of trauma from Carty's rape (deemed waived) (Pet. 38a-43a). Moreover, the court failed to aggregate the postconviction evidence with the mitigating evidence originally presented by Carty's family. (*See id.*) Because the Fifth Circuit assessed prejudice in this piecemeal fashion, it violated this Court's teachings in *Strickland*, *Wiggins*, and *Williams*.

The State's remaining objections go to the outcome of the prejudice inquiry, not whether certiorari is warranted to consider the manner in which the Fifth Circuit misapplied the prejudice test, in conflict with other circuits. (*See* Pet. 26-27.)

The State baldly asserts that evidence from the 17 St. Kitts witnesses should be discounted as "weak and stale." (Resp't's Br. 23.) Yet, such evidence provided an otherwise wholly-absent version of not only the beginning half of Carty's life, but also of her continuing contact with her closest island friends. Qualitatively and quantitatively, it would have enhanced her defense, allowing "the jury to see [her] as someone they d[id] not want to kill." (USCA5 2326). *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009) (explaining that court must "weigh the quality and quantity of the available mitigating evidence"). Most importantly, without this testimony, the jury saw only the picture of a woman with no friends, no contacts—a simple loner not worth saving.

The State concludes that the "omitted piece[s] of mitigation evidence w[ere] individually weak" (Resp't's Br. 22), and when combined with the existing mitigation evidence, "do[] not establish a reasonable probability that jury would have chosen a life sentence" (*id.* at 24). However, "even when *some* mitigating evidence is presented at trial, prejudice is still possible if that evidence is substantially incomplete." *See Walbey v. Quarterman*, 309 F. App'x 795, 802 (5th Cir. 2009) (unpublished); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003). Just so here, where counsel's "mitigation defense" consisted only of boilerplate violent offender questioning.

This Court should grant review because the Fifth Circuit erred by failing to evaluate the totality of available mitigation evidence to determine whether the balance of aggravating and mitigating circumstances warranted death.

The Eleventh Circuit's recent commission of this error—"*separately* consider[ing] each category of mitigating evidence and [holding] it was not unreasonable for the state court to discount each category as it did"—resulted in reversal by this Court. *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (emphasis added). This Court, by contrast, cumulated all four categories of mitigating evidence and concluded that Porter was prejudiced by his counsel's deficiency. *Id.* at 454. This Court's own assessment of the sentencing-prejudice inquiry reveals that courts *must* perform this cumulation. *See id.* This Court may wish to grant, vacate, and remand for reconsideration in light of *Porter*.

III. The Fifth Circuit improperly applied *Lockhart*.

The State concedes that the Fifth Circuit would have erred had it "require[d] that petitioner show something more than a reasonable probability of a different outcome" but argues that the court avoided error because its "stray citation" to *Lockhart v. Fretwell*, 506 U.S. 364 (1993), was "innocuous." (Resp't's Br. 27-28.)

The Fifth Circuit, however, did not merely innocuously cite *Lockhart*—it *applied* it. As stated in the first paragraph of its discussion of conviction prejudice: "[A]lthough this is a close case, [Carty] has not *made the requisite showing* that "[Corona's] testimony rendered her conviction *'fundamentally unfair or unreliable.'*" (Pet. App. 33a (emphasis added) (citing *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997), and quoting *Lockhart*, 506 U.S. at 369).) By stating *Lockhart*'s test as providing the "requisite" standard, and then concluding that Carty failed to

satisfy that test, the Fifth Circuit applied *Lockhart*. (*Id.*) The court then emphasized its reliance on *Lockhart*: "Corona's testimony was undoubtedly damaging to Carty's defense, but it did not render her conviction *fundamentally unreliable*." (*Id.* (emphasis added).) The Fifth Circuit therefore subjected Carty to a more stringent prejudice inquiry than *Strickland* requires. *See Williams v. Taylor*, 529 U.S. 362, 394 (2000) (reversing improper *Lockhart* prejudice analysis).

Finally, in contrast to the State's belief that "[t]he Fifth Circuit is well aware of the limited circumstances in which *Lockhart*'s heightened prejudice standard applies" (Resp't's Br. 26), the court erroneously has applied *Lockhart* at least three other times (Pet. 32). Accordingly, the Fifth Circuit needs additional guidance on the correct application of *Strickland*'s prejudice standard.

CONCLUSION

For all these reasons and those briefed in Carty's petition, this Court should grant certiorari.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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BRIEF OF STEVE HUMPHRIES, DOCUMENTARY FILM MAKER AND AUTHOR, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF STEVE HUMPHRIES, DOCUMENTARY FILM MAKER AND AUTHOR, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Amicus Steve Humphries is an eminent documentary film maker based in Britain. His company, Testimony Films, has made many major award

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any party to the action before the Court, or any person or entity other than the undersigned *amici*, make a monetary contribution to the preparation or submission of this brief.

winning films for the British Broadcasting Corporation (BBC), Channel 4 (in Britain) and other broadcasters on both sides of the Atlantic. His reputation for revealing first-person testimony has earned him the moniker, the Louis "Studs" Terkel of Britain. His work has ranged from gathering the testimonies of the last hundred surviving veterans of World War One, to documenting the tragic heroism of New York firefighters in 9/11, to exposing widespread abuse in church institutions for children and young mothers in Ireland.

Central to Mr. Humphries's work—and the work of Testimony Films—are powerful first-person accounts that question our assumptions, expose injustices and reveal deeper truths. In the United States his work has been featured by the Sundance Channel and has won gold and silver awards at the New York, Chicago and San Francisco Television film and television festivals. Mr. Humphries also has more than twenty books to his name, many of them exploring the issues raised in his films in greater depth. Mr. Humphries has a reputation for collecting testimony that illuminates difficult, complex and sometimes taboo subjects.

Mr. Humphries' interest in the Linda Carty case dates to 2009, following widespread publicity the case received in the British press. He had no strong opinion on capital punishment and had never previously campaigned on the issue. The plight of Linda Carty, however, intrigued him—a British woman on Death Row who proclaimed her innocence and pleaded that she had never received a fair trial. He decided to investigate the truth of Linda's claims. During the fall of 2009, Channel 4 commissioned a documentary on Linda Carty's case from Mr.

Humphries. He and his team spent weeks sifting through original records of the trial and appellate courts. In the course of this investigation, Mr. Humphries felt there were so many unanswered questions, so many discrepancies in evidence and such a clear case of injustice that he needed to investigate further.

In January 2010 Mr. Humphries flew to Texas and began documenting Linda Carty's story. Most importantly, Mr. Humphries secured an interview with Linda Carty on Death Row in Gatesville, Texas. In an hour's filming, the two covered many difficult and intimate subjects—the dream she had of bettering herself in Houston by studying pharmacy at the university, the brutal rape that led to further tragedies of pregnancy and the adoption of the rapist's child, her downward spiral in the aftermath of the rape, how she worked as an informant for the Houston Drug Enforcement Agency, and how she believes she was framed by enemies she made in the course of her work in the dangerous and unforgiving drugs underworld. She also spoke about the one dream that has helped her endure the agony of eight years on Death Row and the execution which looms ever closer: the opportunity of a fair trial, to clear her name and to be reunited with her family, in particular the two small grandchildren whom she is not allowed to see.

Gathering the testimonies of Linda Carty, her family and others, convinced Mr. Humphries that justice had failed in this case. He has interviewed on camera more than a thousand men and women, but has never believed more strongly that he has been recording an appalling injustice. In such a case Mr. Humphries feels he cannot stand by while a woman

is executed, when she was apparently denied her right to a competent counsel and as a result never stood a chance of having her innocence demonstrated to the jury, or establishing that she was not worthy of the death penalty.

Amicus recognizes the concern expressed in the U.S. Supreme Court Rule 37(1) that unnecessary *amicus curiae* briefs are a burden upon any court. However, Mr. Humphries knows of no other case in which a documentary film maker has stepped out from behind his camera to file such a brief. The brief reflects the profound concern he shares with the Court for the central questions presented by this case.

Steve Humphries therefore respectfully files this brief as *amicus curiae*.

FACTUAL BACKGROUND TO THE ROLE OF THE *AMICUS CURIAE* IN THIS CASE

As Mr. Humphries delved deeper into the details of this case, it became clear to him that profound doubts might exist as to Linda Carty's guilt and her suitability to be executed, due to the catastrophic performance of her trial counsel. Jerry Guerinot failed to meet his obligations to Linda Carty in many ways, detailed in her brief, previously filed with this Court.

What has shocked *Amicus* more than anything is that Mr. Guerinot was forced on her as appointed counsel, notwithstanding a similar catalogue of errors committed by Mr. Guerinot that can be traced through the trials of 39 prisoners charged with capital murder, throughout a career spanning from 1980 to 2003. Out of these, 20 have received the death penalty.

Amicus appears as a fellow British national to Linda Carty. In recognition of the United Kingdom and the United States' unshakeable commitment to Due Process, *Amici* urges this Court to prevent the execution of an innocent woman who was denied access to a fair trial through the shameful and ineffective conduct of her trial counsel.

SUMMARY OF ARGUMENT

It is abundantly clear to *Amicus* that but for Mr. Guerinot's deplorable performance at trial, reflecting a pattern of ineffective representation over two decades, Linda Carty would not be facing execution.

ARGUMENT

I. GUERINOT'S INEFFECTIVE PATTERNS OF PRACTICE

Amicus has reviewed research conducted by Linda Carty's defense team concerning Mr. Guerinot's record and has found evidence of a pattern of practice in capital cases that resonates strongly with the poor representation he provided to Carty. The research presents a picture, so stark it gives the lie to any claim that Mr. Guerinot had valid reasons for his inadequate performance in this case.[2]

Mr. Guerinot has represented 39 clients charged with capital murder in a career in capital defense spanning 23 years, from 1980 to 2003. Out of these, 20 have received the death penalty. *See* D. Rose, *Lethal Counsel*, THE OBSERVER, Dec. 2, 2007, at 25.

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[2] Linda Carty's defense team interviewed Guerinot's former clients and their family members, and reviewed records from the trial investigators. These documents are on file with counsel.

With 20 clients sentenced to death, Mr. Guerinot has more clients on Death Row than 32 of the 50 states. According to the most recent figures available, 15 states and the District of Columbia have no death sentence on the books. Colorado (3), Connecticut (10), Delaware (19), Idaho (18), Illinois (15), Indiana (17), Kansas (10), Maryland (5), Montana (2), New Hampshire (1), Nebraska (11), New Mexico (2), South Dakota (3), Utah (10), Virginia (16), Washington (9), Wyoming (1) are responsible for fewer death row prisoners than Mr. Guerinot. *See* Death Penalty Information Center, Facts about the Death Penalty (2010), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

There is a troubling racial pattern to those who were sentenced to death. Like Linda Carty, ten were black, five were Hispanic, four were white and one had a recorded race of "other."

An inspection of Mr. Guerinot's clients who ended up on Death Row is disturbing in another way. Two of the twenty who were sentenced to death were juveniles, and their death sentences have been commuted to life by operation of the Supreme Court ruling in *Roper v. Simmons*, 543 U.S. 551 (2005).

Of the remaining 18 cases, three were dismissed, each pursuant to a state's motion to dismiss due to insufficient evidence. Five pled guilty and were sentenced to life. In six additional cases the death penalty was not on the table by the time the jury came to deliberate on a verdict. In other words, Mr. Guerinot has only avoided a death sentence in four cases out of 24, a failure rate of 83 percent.

While records are not clear in all four of these cases, even here we find very little support for the

possible hypothesis that Mr. Guerinot contributed significantly to the jury's favorable verdict. In the case of Maknojiya Jainul the defense offered no evidence at the punishment phase. In the case of Michael Eugene Riley, Mr. Guerinot apparently conducted no punishment investigation, and contacted no member of the defendant's family, despite the fact that Riley was a father of five. Indeed the defendant in this case apparently found a Sheriff to speak on his behalf the day before the punishment phase began, and several jurors indicated in a questionnaire after sentencing that they feared that they might have been asked to put an innocent man on Death Row.

These cases demonstrate that Jerry Guerinot was a catastrophic capital defense lawyer. *Amici* attempted to contact Guerinot, offering him an opportunity to discuss this case. His secretary came up with a stream of excuses, claiming there was no way of speaking, writing or emailing him directly. Eventually, she admitted that Guerinot did not want to talk about the Carty case.

Shortly after Linda Carty's case, he apparently—and, for Ms Carty, belatedly—gave up doing capital cases. A recent review by the Houston Chronicle leaves the distinct impression, however, that this has only increased the number of those who have fallen victim to his languid approach to the defense of his clients. In 2007-08, he is reported to have had more than *two thousand* court appointed cases at a time, more than 13 times the maximum number of cases recommended by the ABA. *See* L. Olsen, *Hundreds kept jailed for months pretrial; Lawyers for the poor*

have high caseloads, but little oversight, analysis shows, Houston Chronicle (Oct. 4, 2009).

II. GUERINOT'S FAILURE TO MEET WITH LINDA CARTY IN A TIMELY FASHION WAS SYMPTOMATIC OF HIS PRACTICE

It took trial counsel nearly three months to visit Linda Carty, after he was appointed to the case. Even though voir dire was only weeks away, Mr. Guerinot only met her for fifteen minutes. Brief of Petitioner-Appellant at 5, *Carty v. Quarterman*, No. 4:06-cv-00614 (S.D. Tex. Sept. 30, 2008). Unfortunately this late and inadequate initiation of the attorney-client relationship is not unique in Mr. Guerinot's capital practice.

In the capital case of *State of Texas v. George H. Whitaker III*, in the thirteen months from the time of his appointment to trial, Mr. Guerinot reportedly visited Whitaker once for about 30 to 45 minutes. This meeting took place approximately one year before the trial began.

In the capital case of *State of Texas v. Lorenzo Morris*, Mr. Guerinot apparently never met with Morris, not even once.

In the capital case of *State of Texas v. Johnny Ray Johnson*, the prisoner was apparently in the county jail for over a year before his trial started and Mr. Guerinot never visited him at all during that time. Mr. Guerinot did not call him, would not accept his collect calls and did not reply to any of his letters. The first time Johnson saw Mr. Guerinot was on the first day of trial, in court.

In the capital case of *State of Texas v. Willie Marcel Shannon*, Mr. Guerinot's failure to learn the correct

name of his client apparently meant that it took him three months to identify who his client was at the county jail. He went there looking for a Willie Swanson. During the 18 months that Shannon was in county jail waiting for trial, his lawyers apparently visited him three times.

In the capital case of *State of Texas v. Michael Lopez*, the defendant apparently never met with Mr. Guerinot outside of court. It is indicative of his failure to develop any type of relationship with his client, that Mr. Guerinot mistakenly referred to his client during closing argument in the punishment phase as Michael Flores.

Indeed in *State of Texas v. Duane Edward Buck*, Mr. Guerinot apparently visited his client only once before trial, for about thirty minutes, much the same as in Linda Carty's case.

Mr. Guerinot clearly exhibits a pattern of failing to take the time to establish trust with his clients. In a multitude of other capital cases the data reflects his failure to spend the time necessary to develop a meaningful relationship with his clients.

III. THE FAILURE TO ENSURE A TIMELY AND COMPLETE INVESTIGATION IS A GENERAL THEME IN GUERINOT'S REPRESENTATION

There is clear evidence in Linda Carty's petition to this Court that Mr. Guerinot did not ensure a timely and adequate investigation of her case at both phase and *Amicus* will not rehash these facts.

It is worth stressing, however, that trial counsel failed to contact Linda Carty's former boss, DEA Agent Charlie Mathis, who served as a state's

witness. If Mr. Guerinot had bothered to talk to him, Mathis would have testified favorably about Linda Carty's employment history and her character and would have helped trial counsel communicate with Linda Carty. Brief of Petitioner-Appellant at 55-56, *Carty v. Quarterman*, No. 4:06-cv-00614 (S.D. Tex. Sept. 30, 2008).

According to a recent article for *The Guardian* newspaper, when Mathis first arrived in the courtroom to testify for the state at Linda Carty's trial, he was puzzled why he hadn't also been asked to take the witness stand for the defense. During Hannford's interview with Mathis, he said that when he walked past Linda Carty's attorneys, counsel turned to him saying "oh, I guess I should have talked to you, shouldn't I."[3] Agent Mathis was left in no doubt that "she needed a better legal team on her side. I think everybody deserves a proper trial."[4]

There can be no excuse for this. *See Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) ("Essential to the rendition of constitutionally adequate assistance . . . is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived."), quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-1333 (5th Cir. 1983); *see also Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) (trial counsel held ineffective for failing to interview and consult with ballistics expert).

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[3] Interview by Alex Hannaford with Chris Mathis, Agent, Drug Enforcement Agency, in Houston, Texas (October 28, 2009).

[4] *Id.*

Indeed, Mr. Guerinot exhibits a pattern of securing investigative assistance far too late in the day to be effective. In the case of *State of Texas v. Duane Edward Buck*, the record reflects that Mr. Guerinot did not engage the services of an investigator until one month prior to trial. The problems that this lack of time created are evident in the fact that the defendant's ex-wife and mother of his child were not located and interviewed until after the defendant had been found guilty and only the day before the punishment hearing began. The investigator's report reflects that he (the investigator) did not meet with the defendant at any stage. It is very difficult to imagine how it is possible for an investigator to do a competent job in a capital case without ever meeting the client.

In the case of *State of Texas v. Stephen Lindsey Moody*, Mr. Guerinot likewise secured an investigator dangerously close to trial. Mr. Guerinot was appointed to the case on October 16th, 1992, and then took a further two months before seeking to retain a private investigator. The investigator's report indicates that he was apparently not engaged until a matter of days before the trial began—Mr. Guerinot did not ensure any investigation was conducted until March 19th, 1993, and the trial began on March 22nd.

In *State of Texas v. James Emery Paster*, habeas counsel claimed that Mr. Guerinot could not possibly have been prepared for trial due to the fact that there was only 60 days between appointment and trial. This issue was not addressed by Mr. Guerinot's affidavit filed in the case. Mr. Guerinot himself notes his investigation consisted of a review of what the state provided him with. The defense did not call any

witnesses at either the culpability or punishment phase as the witness index in the trial transcript demonstrates. There was apparently no evidence on the file of any investigation conducted or funding sought for any investigation for either phase of the trial.

In *State of Texas v. Jerome Butler*, Mr. Guerinot did not seek to put any defense witnesses on the stand. There is no indication on the record of any funding being sought for investigation or for the employment of any experts pre-trial.

In the *Morris* case, Mr. Guerinot presented no witnesses at either phase of the trial. One of Morris' siblings apparently called Mr. Guerinot many times, without Mr. Guerinot even making the effort to return the calls.

In *State of Texas v. Johnny Ray Johnson*, Mr. Guerinot called no witnesses at the guilt/innocence phase and only one witness during the punishment phase—a prison expert who had never met Johnson. No witnesses concerning the mitigation special issue were put forward. No mitigation testimony was presented from an expert regarding Johnson's mental health history.

In the *Shannon* case, Mr. Guerinot filed a motion stating that it would require a minimum of only 10 hours of out of court time to prepare for a capital court case where the state was seeking the death penalty. This is a stunning underestimate, since competent counsel regularly spends hundreds of hours on capital cases. The only witness whom Mr. Guerinot called throughout the trial was Mr. Shannon himself, and he testified at the culpability phase.

In *Lopez*, the client's father was the only witness presented at the punishment phase. There were no defense witnesses during the culpability phase.

Time and again, Mr. Guerinot did little or nothing to prepare for trial. It was simply not possible to make sensible strategic decisions in a case where Linda Carty's life was at stake when Mr. Guerinot had not bothered to secure the facts on which to base such a decision. All this seems to have been a matter of supreme indifference to the man who Linda Carty had the great misfortune to defend her.

IV. THE FACT THAT GUERINOT FAILED TO CONDUCT INVESTIGATION INTO LINDA CARTY'S LIFE IN ST KITTS DESPITE BEING GRANTED THE FUNDS TO DO SO IS SADLY TYPICAL OF HIS PERFORMANCE IN CAPITAL CASES

Mr. Guerinot failed to conduct any investigation into Linda Carty's childhood in St. Kitts, despite being allowed the funds to do so. This would have led to numerous character witnesses willing to testify on her behalf, including the former Prime Minister and former Deputy Prime Minister of St. Kitts.

The file of trial counsel's own investigator, John Castillo, shows that Linda Carty provided the defense team with names of potential witnesses in St. Kitts: her sister, and the former Prime Minister of St. Kitts, Dr. Kennedy Simmonds. Brief of Petitioner-Appellant at 63-64, *Carty v. Quarterman*, No. 4:06-cv-00614 (S.D. Tex. Sept. 30, 2008). Despite this, Mr. Guerinot either failed to review or failed to follow up on this information. Had Mr. Guerinot investigated here, he would have found extremely important and persuasive information about Linda Carty's

family, childhood, friendships, education, and other experiences that could have been presented. *See Woodson v. North Carolina*, 428 U.S. 280,304 (1976) (defense may present any "compassionate or mitigating factors stemming from the diverse frailties of humankind.").

The lack of a proper penalty phase investigation is again seen in other cases litigated by Mr. Guerinot. In *Moody*, the defense claimed only $445 for investigation fees, which amounted to a mere 6.5 hours of investigation. The investigator's report did not include even an attempt to speak with the defendant's family.

In the case of *State of Texas v. Michael Eugene Riley*, records reflect that no punishment investigation was conducted, and no member of the defendant's family was contacted (despite the fact that he was a father of five children).

In *Morris*, there is apparently no record that Mr. Guerinot spoke to a single family member. Had any investigation been conducted, significant mitigating evidence could have been collected and presented. Lorenzo Morris's habeas counsel hired an investigator who uncovered an absent, drunk and promiscuous mother, an alcoholic, gambling father who would physically abuse his mother and a lengthy history of poverty and neglect. Because of his chaotic home life, Morris did not go to school, but instead stayed on the streets drinking and taking drugs. Yet despite this he had shown himself on occasion to be brave and public spirited. When he was growing up he valiantly tried rescue and to save the life of his young twin sisters after their family home caught fire. Morris also served as country as a soldier in Vietnam. An affidavit filed in post-conviction proceedings from Dr. Paula

Love, a psychologist, concerning these materials, contains the following:

> "It is my firm belief that the instability of the household that raised Lorenzo [Morris] detracted considerably from his development . . . If I had been presented with this investigative product before Lorenzo's trial, I would have been able to testify regarding the mitigating relationship between Lorenzo's background and his ability and function in a free society. All of this investigative material could have been used to offer mitigating testimony."

In *Morris*, Mr. Guerinot admitted to his own incompetence:

> "I did not conduct any independent investigation into Mr. Morris' background . . . I did not seek funding for any mental health professionals, social investigators or any other independent means of learning about his life."

In the *Johnson* case, in federal habeas, a mitigation expert put together a report on Mr. Johnson's social history. The report revealed an early childhood of neglect and removal from his family's care, followed by abuse suffered in a series of foster homes. Despite facing such adversity, various witnesses who lived with Johnson in one foster home spoke about Johnny in a positive, sympathetic manner, and explained his troubled background. Yet due to the fact that Mr. Guerinot had done no meaningful investigation, no witnesses concerning the mitigation special issue were presented at trial.

In the *Shannon* case, no witnesses were called at punishment phase, even though his parents were present for his penalty phase and apparently asked if they could testify for their son.

In the *Lopez* case, the only witness was presented at the punishment phase was his father. The father had been in prison himself for most of Lopez' life and was hardly able to talk about his son's childhood at all. Cynthia Lopez, his aunt, and Cathy Lopez, his grandmother, were both readily available, but Mr. Guerinot had prepared no meaningful penalty phase mitigation appeal and did not let them testify. Had a proper investigation been conducted a plethora of mitigation evidence could have been presented. Habeas counsel obtained records from the Harris County Children's Protective Services (CPS) that would have been available to Mr. Guerinot, had he requested such records. One CPS referral revealed a history of domestic violence in the family involving the step-father. By May of 1993, the report was classified as "life threatening." At this stage, CPS noted that Lopez's stepfather was drinking excessively and that during such episodes, he had a tendency to strike the boys, including Michael. As a result of these reports, CPS sought custody of the children.

In the *Rivers* case, post-conviction counsel were again able to discover a wealth of mitigating evidence that had been available to Mr. Guerinot at trial but had not been utilized in any effective way. In all, affidavits from nine family members and friends were included in the habeas petition. These were all witnesses who were available to offer mitigating evidence at the punishment phase, and who were not heard at the original trial.

The *Butler* case is a final stark demonstration of Mr. Guerinot's failure to adequately investigate the penalty phase of a case. Mr. Guerinot stated to the court, when asked if he is ready to proceed with his punishment phase presentation: 'I am not going to

put anything on'. Indeed, the trial transcript reflects he put no witnesses on the stand to testify for the defendant in regard to either special issue that the jury at that time had been asked to consider. There is no indication that any funding was sought for an investigator or any expert assistance for this phase of the trial. The basis of his closing argument was to tell the jury that they should spare his client's life because to sentence him to life in prison would actually be far worse that giving him the death penalty.

In short, the failing in Ms Carty's case had nothing to do with strategy—only ineptitude and a callous disregard for human life.

V. THERE IS NOTHING NEW IN GUERINOT'S TOTAL FAILURE TO INVESTIGATE THE CLIENT'S FOREIGN NATIONALITY AND ITS IMPORTANT CONSEQUENCES

Trial counsel failed to investigate whether Linda Carty was a foreign national or to discuss the consequences of this with his client so that she would see the importance of it. Brief of Petitioner-Appellant at 91, *Carty v. Quarterman*, No. 4:06-cv-00614 (S.D. Tex. Sept. 30, 2008).

This was, unfortunately, par for the course in Mr. Guerinot's practice. In the case of *Syed Mohmed Rabbani*, as in Linda Carty's case, Mr. Guerinot neither recognized nor raised the client's rights under the Vienna Convention on Consular Relations, which requires notification of the consulate only if the detained individual requests it. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101.

Apparently, no overseas witnesses testified at his trial either. This was despite the fact that during oral argument on a motion to suppress statements made by the defendant, Rabbani testified in broken English, "I'm a foreigner" and described how, on arrest, the police ask to see his passport.

Thus, even when the evidence stared him in the face, Mr. Guerinot did not get around to advising his client properly and representing him effectively.

CONCLUSION

In conclusion, then, Linda Carty's trial was utterly flawed—because of a lawyer whose career has seen one inadequate defense after another. It is no exaggeration to suggest that Mr. Guerinot has perhaps the worst record of any capital lawyer in the United States. The attached DVD captures the devastating effect of Guerinot's ineffectivness not only on Linda, but her family, appellate lawyers, British consulates and *Amici*.

Mr. Humphries does not ask that the case necessarily be reversed—only that this Court grants Linda Carty the first fair hearing of her case thus far.

Respectfully submitted,

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